

1 Stanley A. Zlotoff, State Bar No. 073283
2 Attorney at Law
3 300 S. First St. Suite 215
4 San Jose, CA 95113
5 zlotofflaw@gmail.com
6 Telephone (408) 287-5087
7 Facsimile (408) 287-7645

8
9 Attorney for Debtor

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA**

In re) Chapter 7
)
Susan Bereczky,)
) Case No: 22-50906 SLJ
Debtor.)
/

Ildiko Dihen,)
)
) Adv. Pro. No. 23-5001
Plaintiff,) Date: July 18, 2023
Vs.)
) Time: 1:30 p.m.
Susan Bereczky,)
)
Defendant.)
/

RESPONSE TO MOTION TO ALLOW LATE FILED AMENDED COMPLAINT

Facts

On March 16, 2023, as Docket No. 7, the Court entered its Order sustaining Debtor's Motion to Dismiss. On page 8 of the Order, in the last sentence, the following was recited:

1 "Plaintiff may file an amended complaint no later than April 3,
2 2023." Notwithstanding this clear directive, Plaintiff failed to
3 file an amended complaint until April 13, 2023

4 The only excuse given for the late filing was: "My office
5 inadvertently calendared the due date for the First Amended Complaint
6 as April 13, 2023, instead of April 3, 2023." Declaration of
7 Plaintiff's attorney, filed June 16, 2023, as Docket No. 19, on page
8 1, at lines 23-25.

9 PLAINTIFF SHOULD NOT BE GRANTED RELIEF FROM HER MISTAKE
10 OR INADVERTENCE

11 When a party seeks relief from a proceeding due to mistake
12 or inadvertence, then Rule 60(b)(1) F.R.Civ.P., made applicable
13 by Bankruptcy Rule 9024, is triggered. It provides that a
14 motion for relief from an order or proceeding must be made
15 within a "reasonable time" not longer than one year after the
16 triggering event. In re Williams, 287 B.R. 787, 792 (9th Cir. BAP
17 2002)

18 The seminal 60(b)(1) authority is Pioneer Inv. Serv. v.
19 Brunswick Assoc., 507 U.S. 380, 395 (1993), and it sets forth a
20 four-factor test to establish excusable neglect: (1) the danger
21 of prejudice to the non-movant, (2) the length of delay and its
22 potential impact on judicial proceedings, (3) the reason for the
23 delay including whether it was within the reasonable control of
24 the movant, and (4) whether the movant acted in good faith.

25 The bankruptcy court is not obligated to give equal weight

1 to the four *Pioneer* factors. Rather, using its discretion the
2 court must weigh the factors and then determine whether
3 movant's neglect should be excused. In re PG&E, 331
4 B.R.915, 919 (N.D. CA 2005).

5 Here, only the *Pioneer* factor dealing with the reason for
6 the negligence or inadvertance is in issue.

7 NO ADEQUATE REASON IS GIVEN FOR THE CALENDARING ERROR

8 Plaintiff's excuse is simply that his "office"
9 miscalendared the deadline for filing an amended complaint.
10 That excuse described negligence, but notwhat made the
11 negligence excusable.

12 Clearly the attorney would have read the Order, and so
13 would have seen the deadline standing by itself on page 8.
14 Yet, he faults his office without specifying what made the
15 error excusable, and moreover, he fails to explain what he did
16 or didn't do to ensure that no error would be made. For
17 example, who miscalendared the date; was there a calendaring
18 system in place, and if so had it malfunctioned before; why was
19 there an error made, and who made it; was the office staff
20 experienced ; and did the attorney in charge properly supervise
21 the office staff.

22 In Pincay v. Andrews, 389 F.3d 853,859 (9th Cir. 2004), the
23 Court of Appeal en banc sustained the trial court's finding
24 that a movant's calendaring error would be excused; however, it
25 did so based on a record in which the movant had characterized

1 the reason for the error as the failure of a "carefully
2 designed calendaring system operated by experienced paralegals
3 that heretofore had worked flawlessly."

4 In In re Walker, 332 B.R. 820(Bankr. NV 2005), Judge
5 Markell declined to find excusable neglect for a failure to
6 appear that was allegedly caused by a secretary's calendaring
7 error. Distinguishing *Pincay*, *Walker* reasoned as follows: "In
8 *Pincay*, the attorney produced evidence that he had relied on a
9 well functioning, established calendaring system operated by
10 experienced paralegals. By contrast, the {movant's} Motion
11 presents no evidence of any system used to prevent such
12 mistakes, or the experience level of {movant's} secretary.
13 {quoting from *Moore's Federal Practice Section*
14 60.41{1}{c}{ii} (3d ed. 2005) 'Mistakes resulting from
15 institutionalized procedures, or lack of quality control type
16 of procedures, are not 'excusable.'" *Id* p.831.

17 Additionally, the attorney in *Walker* failed to offer "any
18 excuse for his own neglect, such as any reason for his
19 negligence in failing to discover and thus prevent the error."
20 *Id*.

21 In D&S Family Preservation Trust v. United States, 2
22 F.Supp.2d 1320(D. OR 1998), the movants' attorney represented
23 that the calendaring error was caused by the deadline extending
24 into a new year, so that when he transcribed the deadline into
25 his new calendar, he inadvertently noted the deadline to be in

1 February rather than in January. The motion to allow a late
2 filing of an appeal was denied, because the movants did not
3 "submit any fact in support of a finding that the neglect of
4 counsel in miscalculating the expiration date for the filing of
5 the appeal was 'excusable.'" *Id. at p.1332*

6 Here, Plaintiff rested the Motion for relief solely based
7 on law office negligence, without providing facts to show why
8 that negligence should be excused.

9 THE MERITS OF THE CASE ARE NOT AT ISSUE IN A 60(b)(1) MOTION

10 The bankruptcy court may not base Rule 60(b) relief on the
11 merits of the late filed Objection. In re Wylie, 349 B.R.
12 204,210 (9th Cir. BAP 2006). In the context of a failure to
13 appear at the hearing on the debtor's objection to the
14 creditor's claim and the creditor's excuse that the objection
15 was without merit, *Wylie* explained that "the merits of the
16 claim objection are no longer fair game unless the claimant
17 first establishes a good excuse, cognizable under FRCP 60(b),
18 for its failure to timely contest the objection." *Id.* Although
19 the prejudice factor weighed in favor of the movant, because of
20 the length of delay and inadequate reason for it, the motion
21 was denied.

22
23 CONCLUSION

24 Plaintiff's Motion should be denied.

25 Dated: 7/3/2023

/s/Stanley Zlotoff